FILED
JUN 11 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1003

DORCHESTER CORPORATION,
Petitioner,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA,
FEDERAL POWER COMMISSION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Natural Gas Pipeline Company of America ("Natural"), petitioner below in a statutory review proceeding under Section 19(b) of the Natural Gas Act (*Natural Gas Pipeline Company of America* v. *Federal Power Commission*, 253 F. 2d 3 (3d Cir. 1958), submits this brief in opposition to the petition for certiorari filed by Dorchester Corporation ("Dorchester"), the intervenor in that proceeding.

Statement of the Case

The Court of Appeals in its opinion has summarized, chronologically and in the briefest possible compass, the complex series of events giving rise to this litigation. Reference to that

description (see pp. 19–24 of Appendix A to the petition for certiorari) reveals the following facts—of significance for the disposition of this request for review—which are not reflected in Dorchester's Statement of the Case in its petition:

1. From the initial issuance on July 29, 1952 of the Oklahoma minimum price order, Natural asserted its invalidity through the legal procedures available to it, and made its payments at the minimum price of 9.8262¢ per Mcf only under express protest and with the announced purpose of seeking restitution of the excess over the contract price of 6.253¢, if and when it succeeded in establishing the invalidity of the order.

2. When, after the Federal Power Commission ("Commission") acted to bring the independent producers into compliance with the Natural Gas Act ("Act"), Dorchester sought to file the Oklahoma minimum price as the contract rate effective June 7, 1954, Natural protested that filing and urged the Commission either to reject it or to permit it to become effective only under safeguards which would assure the return to Natural of the excess payments upon the invalidation of the state minimum price law. On November 30, 1954, the Commission accepted the filing on a conditional basis, pending the determination by this Court of Natural's appeal with respect to the state minimum price law. Nearly a year later, however, and after this Court had held the Oklahoma law invalid, the Commission repudiated the condition.

3. On December 6, 1954, Dorchester filed with the Commission a new rate of 10¢ per Mcf, and the Commission permitted this rate to become effective March 1, 1955, but only under bond and subject to further hearing as to its lawfulness. At the conclusion of such hearings, Dorchester voluntarily purported to withdraw and abandon that rate filing; and, by reason of this action, the Commission, in its order of January 5, 1956, dismissed the 10¢ rate proceeding. As contemplated by the Act, the Commission was then under the necessity of directing

Dorchester to make a refund to Natural of the difference between the rate legally in effect immediately prior to March 1, 1955, on the one hand, and the 10¢ rate which Natural began paying on that date as required by the Act, on the other. Having found that the former rate was the contract rate of 6.253¢ per Mcf, rather than the minimum price of 9.8262¢, the Court of Appeals, as it was empowered to do by the Act, directed that the Commission's order of refund be modified accordingly.

Reasons for Denying the Writ

I

Dorchester asserts, as a reason why this Court should grant review, that the determination of the questions presented "affects all other sellers of gas in Oklahoma and Kansas who received payments in excess of their contract prices pursuant to the minimum price laws promulgated by the regulatory agencies of those states," which payments Dorchester characterizes as having been "received with the assurance of this Court in *Cities Serv. Gas Co.* v. *Peerless O. & G. Co.*, 340 U. S. 179 (1950), that minimum price laws were a proper exercise of state regulatory power." There was no such assurance; and, in any event, this case does not have the reach so claimed for it.

In *Cities Service*, no issue was presented as to possible preemption of the field because of the applicability of the Act to independent producers; and this Court expressly noted that it was sustaining the state minimum price law without reference to this issue. When the Oklahoma minimum price order here in issue was promulgated in 1952, Natural was the purchaser who challenged its validity; and when, after *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, was decided in 1954, Natural was the purchaser who protested the filing of the Oklahoma minimum price in response to the Commission's orders promulgated for the purpose of bringing the independ-

ent producers into compliance with the Act, to which they had been subject at all times since its original enactment in 1938. The Court of Appeals decided that the Commission's acceptance of this filing, *in the face of Natural's protest*, violated the principles laid down by this Court in *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956). Thus, this case decides nothing with respect to all those other instances where the buyers acquiesced in the imposition of the state minimum price and entered no objection to the filing with the Commission of the minimum price as the compliance rate.

II

In support of its petition for certiorari, Dorchester first argues that the Court of Appeals has erroneously expanded this Court's rulings sustaining Natural's challenges to the Oklahoma minimum price law (*Natural Gas Pipeline Company of America* v. *Corporation Commission of Oklahoma*, and *Natural Gas Pipeline Company of America* v. *Panoma Corporation*, 349 U. S. 44 (1955); and it couples this claim with the further assertion that the decision below conflicts with other decisions of this Court sustaining various exercises of state regulatory power where preemption had not taken place. There is no such expansion or conflict.

When this Court upheld Natural's attack on the Oklahoma minimum price, it did so in a *per curiam* opinion which noted simply that, in the light of *Phillips*, Congress must be deemed to have preempted the field in such manner as to leave no room for state regulation of the price of natural gas sold in interstate commerce for resale. That the Court considered, and rejected, the argument that preemption did not take place until the Commission, after *Phillips*, moved to prescribe an orderly method for bringing the independent producers into compliance with the comprehensive federal regulatory scheme

provided in the Act, is evident from the lone dissent noted by Mr. Justice Douglas in these terms:

> "Mr. Justice Douglas, being of opinion that State regulation of price is permissible until the Federal price regulation permitted by (*Phillips*) is imposed, dissents."

Three Courts of Appeals have recently held that it is the scope of the majority opinion which is to be accorded this Court's decisions invalidating the state minimum price laws. With respect to the Oklahoma law, this is the holding of the Third Circuit in the opinion below; and it is also the holding of the Fifth Circuit in *Harrington* v. *Natural Gas Pipeline Company of America*, 246 F. 2d 915 (5th Cir., 1957), certiorari denied in No. 901, May 19, 1958. As to the Kansas law, it is the holding of the 10th Circuit in *Cities Service Gas Company* v. *Federal Power Commission*, decided May 14, 1958 and not yet reported. There are no decisions to the contrary.

The argument now advanced by Dorchester was first made in identical terms (and by the same counsel) in a motion to the Fifth Circuit for leave to file a second petition for rehearing in *Harrington*. That is the case in which Natural has gotten a judgment of restitution for the excess payments made, under protest and the compulsion of the Oklahoma minimum price order, to the predecessor in interest of Dorchester, in respect of the period from 1952 to July 1, 1954, the date on which Dorchester took over the seller's position under the contract. In denying the motion founded solely on this argument (253 F. 2d 231), the Fifth Circuit said, on March 5, 1958:

> "PER CURIAM: Leave to file a second petition for rehearing is denied. *Natural Gas Co.* v. *Panoma Corp.*, 349 U.S. 44. The notation of Mr. Justice Douglas's dissent shows that the Court considered the question presented by this second petition for rehearing. See also the recent per curiam opinions of the Supreme Court in No. 85, *Cities Service Gas Co.* v. *State Corporation Commission*

of Kansas, decided January 20, 1958; and in No. 86 *Michigan Wisconsin Pipe Line Co.* v. *Corporation Commission of Oklahoma*, No. 111 *Phillips Petroleum Co.* v. *Corporation Commission of Oklahoma*, No. 112 *Phillips Petroleum Co.* v. *Corporation Commission of Oklahoma*, No. 113 *Phillips Petroleum Co.* v. *Corporation Commission of Oklahoma*, decided January 27, 1958, 26 L.W. 3219."

In the petition for certiorari filed in respect of that decision, which petition was denied on May 19, 1958, the same argument, in both its aspects and precisely in its present formulation, was pressed upon this Court. This argument was first made below in the petition for rehearing filed with the Third Circuit on March 28, 1958. This petition was denied on April 10, 1958 without opinion.

This unanimity among the Circuits as to the meaning of this Court's decisions invalidating the state minimum price laws is not surprising. Not only does this Court's purpose to regard these laws as void *ab initio* appear from the face of the Court's opinion in *Panoma*, especially when considered in connection with Justice Douglas' dissent, but any other conclusion misconceives the true nature of the Commission's efforts in 1954, after *Phillips*, to deal with the extraordinary situation of the independent producers who had actually been under federal price regulation since 1938 but who had not been complying with the Act by reason of mistaken assumptions as to their amenability to it. The Commission's No. 174 orders did not impose regulation for the first time. Rather, they sought to devise an administrative method for bringing the producers into compliance with regulation which had been imposed long before. There is, thus, no conflict between this Court's decision in *Panoma* and other decisions, relied upon by Dorchester, where federal regulation had not yet been in fact imposed and where the Congressional intent to preempt depended for its effectuation upon such further action.

III

Dorchester's second argument is that the Court of Appeals exceeded its authority when it directed that the Commission's order of January 5, 1956, under review, be modified so as to provide that the refund therein ordered be computed as the difference between 10¢ per Mcf and the prior legally effective rate of 6.253¢ rather than the Oklahoma minimum price of 9.8262¢, which latter rate the Court held had never become legally effective.

Section 19(b) of the Act provides that the Court of Appeals "shall have exclusive jurisdiction to affirm, modify, or set aside (the order under review) in whole or in part." The scheme of rate regulation provided in Section 4(d) of the Act contemplates that, when an increased rate is filed, the Commission may, after an initial suspension, permit it to become effective but under bond and subject to further hearing as to its lawfulness. This section further contemplates that, upon completion of these further proceedings, the Commission will "order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified."

Dorchester filed the 10¢ rate as a rate increase to supersede the prior legally effective rate. The Commission first suspended this rate, and then permitted it to become effective, under bond and subject to further hearing. That hearing was held and the record closed. At that point Dorchester acted to abandon and withdraw its 10¢ rate filing. The Commission acquiesced in this action by ordering the 10¢ rate dismissed; and, as contemplated by the statute, it directed a refund. Its only error was that it considered the Oklahoma minimum price to be the prior effectively filed rate. When the Court of Appeals reversed it on this point and held that the contract rate was the prior effective rate, it was entirely appropriate for the Court

to direct modification of the refund provision in the order so as to reflect the proper basis of computation within the meaning of the statutory scheme. The Commission could not have done other than this if the Court had not acted to direct the modification itself, for the reason that the 10¢ rate proceeding had been dismissed and terminated at Dorchester's own instance, and the refund requirements of the statute thereupon became operative.

The situation created by this dismissal of the 10¢ rate proceeding is very similar to the one that was present in *Mobile*. There, the seller's increased rate filing, permitted by the Commission to become effective over the buyer's protest but only under bond and subject to further hearing, subsequently became moot before a final determination was made as to its lawfulness. This Court expressly recognized the propriety and necessity of a refund to the buyer of the difference between this increased rate during the period of its effectiveness, and the prior legally effective rate for which it had been sought to be substituted.

Dorchester is, and has been, free to initiate at any time a proceeding in which it can seek to have set aside the legally effective rate of 6.253¢ per Mcf, and to substitute for it any increased rate which it may choose to file. That action must, however, operate prospectively in the circumstances of this case, and it cannot be initiated by a remand to the Commission for the purpose of considering the computation of the refund. Nothing can be done by the Commission in the present posture of the case except to direct the refund required by the statute upon the dismissal and termination of the 10¢ rate proceeding. The direction by the Court of Appeals of the appropriate modification of the Commission's order for this purpose was proper

under the circumstances and did not transgress upon the rate regulatory functions committed to the Commission.

Respectfully submitted,

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